No. 15-674

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FORMER COMMISSIONERS OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FORMER COMMISSIONERS OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Former Commissioners of the United States Immigration and Naturalization Service, Doris Meissner and James Ziglar, respectfully submit this brief in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

Amici are former Commissioners of the United

[1] No party or counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the brief's preparation or submission. No one other than *amici* or their counsel made any such monetary contribution. The parties have consented to the filing of this *amicus* brief.

States Immigration and Naturalization Service ("INS"), the predecessor agency in the Department of Justice ("DOJ") to the federal agencies now responsible for immigration enforcement under the Department of Homeland Security ("DHS").

Doris Meissner served as Commissioner of the INS under the administration of President William Clinton from 1993 to 2000. She also served under the administration of President Ronald Reagan as Acting Commissioner of the INS in 1981-1982 and then as Executive Associate Commissioner, the third-ranking post in the agency, until 1986. During the administrations of Presidents Jimmy Carter and Gerald Ford, she was in the office of the Associate Attorney General and of Policy and Planning at the Department of Justice with responsibility for advising the Attorney General on immigration matters. James Ziglar was appointed Commissioner of the INS by President George W. Bush in 2001 and served until the agency was dissolved and its missions transferred to DHS.

Amici have no personal stake in the outcome of this case. As former heads of the nation's primary immigration administrative and enforcement agency, they can attest to the importance of the Executive's ability to implement policies for deferred action and work authorization. Based on their service in five administrations, amici have a unique understanding of the importance of setting administrative and enforcement goals and priorities—both in principle and practice—in order to effectively administer and enforce the nation's immigration laws. They also can attest to the disruption to fair and effective administration and enforcement of those laws that would ensue if the Executive's longstanding immigration

authority is undermined.

Ms. Meissner and Mr. Ziglar are Senior Fellows at the Migration Policy Institute, a non-profit, nonpartisan policy research organization dedicated to the study of the movement of people worldwide. The views expressed in this brief are their own.

SUMMARY OF ARGUMENT

Four years ago, this Court acknowledged the key role that Executive discretion plays in the administration of the immigration system. *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012). Without discretion over removal determinations, the Executive branch is unable to respond flexibly and appropriately to the "immediate human concerns" presented in the immigration context. *Id.*

For that reason, Congress has granted the Executive extensive immigration powers, charging the Secretary of the Department of Homeland Security (DHS) with "[e]stablishing national immigration enforcement policies and priorities," and endowing him with the authority to "issue such instructions; and perform such other acts as he deems necessary" to "administ[er] and enforce[]" immigration laws. 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(1) and (3). The Executive long has utilized this grant of statutory authority to establish priorities for the removal of certain aliens, including through the granting of deferred action to identified individuals or classes of aliens. It also has long exercised the concomitant power to authorize employment for those same aliens who are granted deferred removal.

These twin powers of deferring removal and granting employment authorization are essential to the rational, effective, and coherent administration of

the immigration system. Changed circumstances at home or abroad frequently create an immediate humanitarian, foreign policy, or national security imperative to defer the removal of particular aliens or a particular class of aliens. New legislation also may create gaps in immigration policy that the Executive must fill. And practical constraints, including federal budgetary realities, often mean that the Executive does not have the resources to remove significant numbers of removable aliens. The ability to establish removal priorities and to deploy deferred action policies, as well as to authorize employment for deferred action recipients, permits the Executive to tailor rational policies that meet each of these challenges.

On November 20, 2014, the Secretary of Homeland Security issued a memorandum providing guidance with respect to the initiation of a policy designed to offer "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA). Pet. App. 411a-419a. That policy is a straightforward exercise of the aforementioned statutorily delegated powers: It deems a class of aliens eligible for deferred action; consistent with pre-existing regulations, it provides that those same aliens are eligible for work authorization; and it notes that a recipient of deferred action is deemed "lawfully present." At the same time, the policy explicitly provides that it "confers no substantive right, immigration status, or pathway to citizenship" because "[o]nly an Act of Congress can confer these rights." *Id.* at 419a.

Respondents nevertheless contend that DAPA is invalid. They assert that its scale is too large to fit within the Executive's statutory powers. But Congress has charged the Executive with creating "na-

tional immigration enforcement policies and priorities," a mandate that demands that the Executive act on a scale necessary to effectuate its policy objectives. The statutory mandate does not define a number that is "too large to fit." Moreover, budgetary constraints imposed by Congress dictate that the Executive must defer the removal of at least 10.6 million removable aliens at the present time. Sufficiently broad policies are necessary to ensure consistent prioritization and treatment of these aliens. The development of such policies by the Secretary ensures uniformity and political accountability in the immigration system.

Respondents also contend that the Executive lacks the power to authorize employment for any alien whose employment eligibility has not been specified by statute. That contention belies decades of Executive practice, predicated on an understanding of the Executive's statutory authority that has been recognized repeatedly by Congress. It also would severely undermine the removal discretion that is at the heart of the immigration system; the Executive would be able to decline to remove certain aliens, but would be unable to give those aliens the ability to support themselves. That might lead recipients of deferred action to become public charges, contrary to immigration statute strictures.

Aside from work authorization, two other minor effects result from a grant of deferred action; neither affects the validity of DAPA. *First,* deferred action recipients are deemed "legally present" for the purposes of 8 U.S.C. § 1182(a)(9). But that designation has little practical import since it does not affect the alien's legal status, and does not prevent the alien's removal or confer any eligibility for lawful perma-

nent residence or citizenship. *Second*, a recipient of deferred action is eligible for certain federal benefits but that results from a statutory provision which extends eligibility to those "who [are] lawfully present in the United States *as determined by the Attorney General*." *Id.* at § 1611(b)(2)-(4) (emphasis added). Both of these minor consequences of a grant of deferred action under DAPA are well within the Secretary's discretion to control.

Respondents' arguments are further belied by Congress' repeated recognition, endorsement, and encouragement of the Executive's utilization of its statutory immigration powers with respect to deferred action and work authorization. In 1996, Congress passed legislation that included a provision "designed to give some measure of protection" from judicial review to the Executive's deferred action determinations. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999). Throughout the last several decades, Congress also has expressed approval for class-based deferred action initiatives, enacting legislation that initiates and expands specific deferred action programs, and creating a clear presumption that the Executive has the authority to confer deferred action where it sees a need.

Further, recognizing that deferred action and employment authorization are complementary and necessarily parallel exercises of power, Congress has also ratified the Executive's right to grant employment authorization. In 1981, the Reagan administration used its authority to "administ[er] and enforce[]" the immigration laws to implement a regulation stipulating that the Attorney General could grant work authorization to certain deferred

action recipients, as well as other categories of aliens who lacked specific statutory authorization for employment. 8 C.F.R. § 109.1 (1982) (citing 8 U.S.C. §1103(a)). Five years later, Congress endorsed this Executive action in a law designed to prevent "unauthorized alien[s]" from obtaining work. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3368. That law defines an "unauthorized alien" as one who has not been authorized to be employed by the law itself "or by the Attorney General." 8 U.S.C. § 1324a(h)(3).

In the years since, Congress has placed only three minor conditions on the Executive's ability to issue such authorizations. The establishment of those conditions further emphasizes Congress' assumption that—absent a statutory limitation—the Executive enjoys the discretion to confer work authorization on removable aliens. Congress has demonstrated that it knows exactly how to limit Executive discretion in this realm. In the matter at hand, it has chosen not to do so.

Finally, respondents contend that DAPA violates the "Take Care Clause" of the Constitution, but this reasoning defies logic. The President is enforcing the immigration laws through DAPA because those laws vest him with broad discretion in this area. Nor can the Executive branch be faulted for failing to remove the estimated 40% of removable aliens who are eligible for relief under DAPA when Congress' own budgetary and appropriations decisions prevent the Executive from removing an estimated 96% of all removable aliens. The Constitution does not mandate the impossible.

DAPA is valid both as a statutory and a constitutional matter, and the President has faithfully executed his duties under the Constitution.

ARGUMENT

I. THE EXECUTIVE HAS THE WELL-ESTABLISHED STATUTORY AUTHORITY TO GRANT DEFERRED ACTION AND WORK AUTHORIZATION.

Regulation of immigration is a core function of the federal government. Congress has established the fundamental design of the immigration system through statute, but implementing and enforcing that statute necessarily requires the Executive to make a broad range of discretionary choices through setting of enforcement priorities and policies. The Executive's discretion includes the power to grant deferred action and work authorization to aliens who otherwise are eligible for removal. This broad statutory delegation of power is necessary and appropriate in light of the particular and unique demands of the immigration system.

A. Congress Has Delegated Broad Discretion To The Executive In Establishing And Executing Immigration Policy.

The Constitution commits immigration authority to Congress. U.S. Const. art. I, § 8, cls. 3 & 4. Congress, in turn, has delegated a wide degree of discretion to the Executive. Most notably, Congress has tasked the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities," and it has "charged" the Secretary with "the administration and enforcement of" the Immigration and Nationality Act (INA),

8 U.S.C. § 1101 *et seq.*, "and all other laws relating to the immigration and naturalization of aliens." 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a). Moreover, Congress has directed the Secretary to "issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" to "administ[er] and enforce[]" immigration laws. 8 U.S.C. § 1103(a)(3).

The Executive branch long has understood and taken action pursuant to the wide grant of statutory authority contained in these provisions (as well as their analogous predecessors). That authority empowers federal immigration officials to exercise prosecutorial discretion in removing aliens whose presence in the country is illegal. Indeed, this Court recognized recently that "one of [the] principal features [of the removal system] is the broad discretion exercised by immigration officials, who must decide whether to pursue removal at all." *Arizona* v. *United States*, 132 S. Ct. 2492, 2495 (2012).

In exercising this statutory grant of removal discretion, the Executive has found it necessary both to assign a high priority to the removal of certain aliens and classes of aliens and, conversely, to assign a much lower priority to the removal of others. This practice of assigning a lower priority and reflecting that lower priority in an official action delaying removal is known as "deferred action." *Reno* v. *American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 483-484 (1999). When an alien unlawfully present in the United States receives deferred action, the Secretary defers removal of that individual for a set period of time "for humanitarian reasons or simply for its own convenience." *Id.* at

484. While the alien remains "deportable," he or she is temporarily permitted to remain within the country. *Id.*

Further, the Executive long has recognized that it has the power to issue work authorization to those aliens who receive deferred action. That authority flows from the statutory grant of power to "perform such other acts as [the Secretary] deems necessary" to "administ[er] and enforce[]" the immigration laws. 8 U.S.C. § 1103(a)(1) and (3). Granting work authorization to deferred action recipients ensures that aliens permitted to remain in the United States are self-sufficient, and do not become public charges, in keeping with the principles that have guided immigration policy since this country's earliest immigration statutes. *Id.* § 1601(1).

In 1981, when Amicus Doris Meissner was Acting Commissioner of the Immigration and Naturalization Service (INS), the Reagan administration formally recognized the symbiotic relationship between deferred action and work authorization. Citing the statutory grant of authority in Section 1103, the administration promulgated a regulation describing the circumstances in which immigration officials could grant work authorization to aliens. 8 C.F.R. 109.1(b)(7) (1982); *see* 44 Fed. Reg. 43,480 (July 25, 1979) (setting out the proposed rule and observing that "The Attorney General's authority to grant employment authorization stems from [Section 1103] which authorizes him to establish regulations, issue instructions, and perform any actions necessary for the implementation and administration of the [INA].")

That 1981 regulation made certain recipients of deferred action eligible for work authorization. Specifically, it permitted immigration officials to authorize the employment of:

> [a]ny alien in whose case the [relevant immigration official] recommends consideration of deferred action, an act of administrative convenience to the government which gives some cases lower priority: *Provided*, The alien establishes to the satisfaction of the [immigration official] that he/she is financially unable to maintain himself/herself and family without employment.

8 C.F.R. § 109.1(b)(7) (1982); 46 Fed. Reg. 55,921-55,922 (Nov. 13, 1981).

While the initial regulation was implemented by the Reagan administration, a version of it has remained in effect during every subsequent administration and still is in force today. *See* 8 C.F.R. § 274a.12(c)(14) (permitting work authorization for "[a]n alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment").

In the thirty-five years since it was implemented, Congress has taken no action to limit or otherwise alter the scope of this regulation. To the contrary, in enacting the Immigration Reform and Control Act (IRCA) in 1986, Congress expressly acknowledged the Secretary's authority to issue work authorizations. Pub. L. No. 99-603, § 201, 100 Stat. 3394; 8 U.S.C. § 1324a(h)(3); *see infra*, Part III.B.

B. The Breadth Of The Executive's Statutorily Delegated Discretion Is Required By The Particular Demands Of The Immigration System.

The authority to grant deferred action and work authorization are broad powers, but they are within the scope of the Secretary's wide grant of statutory authority to create "national immigration enforcement policies and priorities," and to "issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" to "administ[er] and enforce[]" immigration laws. 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(1) and (3). The vast and complex system of immigration law requires the Executive not only to make decisions about how to prioritize enforcement resources, but also how to do so in a way that makes the system function effectively, while balancing a range of foreign policy, national security, economic, and humanitarian concerns.

As this Court long has recognized, immigration decisions "implicate our relations with foreign powers" and depend on a wide variety of "changing political and economic circumstances." *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976); *see also Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) ("any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"). Therefore, in forming immigration policy, the federal government must have the "flexibility * * * to respond to changing world conditions." *Diaz*, 426 U.S. at 81.

Granting discretion to executive officials in the enforcement of immigration law best ensures that immigration policy will both reflect current world conditions and "embrace[] immediate human concerns." *Arizona*, 132 S. Ct. at 2499. As this Court recently explained,

> Some discretionary decisions involve policy choices that bear on this Nation's international relations. * * * The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

Id.

Changing conditions in our own country also may demand a flexible approach from the Executive with respect to a particular class of aliens. That was the case, for example, when Hurricane Katrina caused the temporary closing of many universities that were in the storm's path. The George W. Bush administration used its enforcement discretion to grant deferred action and work authorization to affected foreign students and their family members. U.S. Citizenship & Immigration Servs. (USCIS), *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* 1, 7 (Nov. 25, 2005) https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf.

New legislation also may necessitate the exercise of Executive discretion for humanitarian reasons. For

example, in 1986, Congress passed the IRCA, which established a pathway to lawful status for some aliens who had been present illegally within the United States. Many of these aliens had family members who were not able to take advantage of this pathway. To avoid separating families, the Reagan administration "exercis[ed] the Attorney General's discretion by allowing minor children to remain in the United States even though they d[id] not qualify on their own" if their parents "have qualified under the provisions of IRCA." Alan C. Nelson, Comm'r, INS, *Legalization and Family Fairness—An Analysis* (Oct. 21, 1987), *in* 64 No. 41 Interpreter Releases 1191 app. I, at 1201 (Oct. 26, 1987). The George H.W. Bush administration further expanded this "Family Fairness Program" to qualified spouses and made clear that participants in the program were eligible for work authorization. Memorandum from Gene McNary, Comm'r, INS, to Reg'l Comm'rs, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990), *in* 67 No. 6 Interpreter Releases 153, app. I, at 164-165 (Feb. 5, 1990) (McNary Memo).

During a period when Amicus Doris Meissner was serving as Commissioner of the Immigration and Naturalization Service, the Clinton administration took similar action after Congress passed the Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, Tit. IV, 108 Stat. 1902. That statute permits certain unlawful aliens that have been abused by United States-citizen or lawful-permanent-resident family members to self-petition for a change in immigration status without having to rely on the abusive spouse or parent. 8 U.S.C.

§ 1154(a)(1)(A)(iii)-(iv) and (vii). The administration established a class-based deferred action policy that directed immigration officials to assess whether successful self-petitioners should be granted deferred action while waiting for a visa to become available. *See* Memorandum from Paul W. Virtue, Acting Exec. Assoc. Comm'r, INS, to Reg'l Dirs., *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997).

In 2001, during a period when Amicus James W. Ziglar was serving as the Commissioner of the INS, the George W. Bush administration initiated an analogous program for victims of human trafficking and other crimes who were made eligible for "T" and "U" visas under the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, 114 Stat. 1464. *See* Memorandum from Michael D. Cronin, Acting Exec. Assoc. Comm'r, INS, for Michael A. Pearson, Exec. Assoc. Comm'r, INS, *VTVPA Policy Memorandum #2*—"T" and "U" Nonimmigrant Visas (Aug. 30, 2001); *see also* 67 Fed. Reg 4784, 4800-4801 (Jan. 31, 2002); 72 Fed. Reg. 53,014, 53,039 (Sept. 17, 2007).

Even when the federal government is not faced with an immediate crisis or a recent legislative development, enforcement discretion is necessary to formulate rational responses to federal budgetary constraints. As immigration officials have recognized time and again, "limitations in available enforcement resources * * * make it impossible for a law enforcement agency to prosecute all offenses that come to its attention." Memorandum from Bo Cooper, Gen. Counsel, INS to Comm'r, INS, *INS Exercise of Prosecutorial Discretion* 2 (July 11, 2000). Therefore, "[a]s a practical matter, * * * law

enforcement officials have to make policy choices as to the most effective and desirable way in which to deploy their limited resources." Memorandum from Sam Bernsen, Gen. Counsel, INS, to Comm'r, INS, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* 1 (July 15, 1976). Indeed, Amicus Doris Meissner issued the first formal memorandum outlining the guidelines for the exercise of prosecutorial discretion for field officers. Those guidelines remain the foundation for all subsequent guidelines provided to immigration officers in the field. Memorandum from Doris Meissner, Comm'r, INS, to Reg'l Dirs., *Exercising Prosecutorial Discretion* (Nov. 17, 2000).

At present, there are an estimated 11 million removable aliens within the United States, Pet. App. 5a, but Congress typically allocates funds sufficient to remove approximately 400,000 aliens per year. *See* DHS, *Yearbook of Immigration Statistics: 2013 Enforcement Actions, Tbl. 39, Aliens Removed or Returned: Fiscal Years 1892 to 2013* (2014). Because these budgetary constraints mean that the Secretary cannot possibly remove all those aliens who are eligible, the rational functioning of the immigration system depends on the Secretary's power to set priorities, to defer removal of large numbers of aliens, and to provide some means for those recipients of deferred action to support themselves until they may be removed.

II. INVALIDATING DAPA WOULD SEVERELY INHIBIT THE EXECUTIVE'S ABILITY TO ADMINISTER AND ENFORCE IMMIGRATION LAW.

In 2014, the Secretary of Homeland Security issued a guidance memorandum initiating a policy designed to provide "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA). DAPA directs immigration officials to assign a low priority to the removal of certain aliens with family connections in the United States. It directs officials to consider, on a case by case basis, whether it is appropriate to defer action on the removal of these aliens for a period of three years." It further instructs that aliens who receive deferred action may be eligible for work authorization.

DAPA is fully consistent with the Executive's statutorily conferred authority in the immigration context. Nevertheless, respondents contend that this Court should affirm the Fifth Circuit's conclusion that DAPA is invalid because the Executive lacks the power to implement such a policy. Such a holding would represent a dramatic departure from historical practice and would be inconsistent with Congress' extensive delegation to the Executive branch. Furthermore, it would severely impair the Executive's ability to implement and administer the United States immigration system, leaving a void that cannot be filled by other branches of the government.

A. The Executive Has The Power To Implement Immigration Policies On A Scale Sufficient To Fit The Circumstances.

Respondents repeatedly emphasize that DAPA must be invalid because of the large number of aliens it makes eligible for deferred action and work authorization. But Congress has expressly charged the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). That mandate requires the Secretary to make policies on a scale sufficient to address the problem presented, whether large or small.

Nor have respondents pointed to any statutory provisions that limit the scale of Executive actions in this context. That is significant given that the Executive has exercised its discretion to provide similar relief to broad classes of aliens in numerous instances over the last sixty years. *See* Former Fed. Immigration & Homeland Sec. Officials Cert. Amicus Br. app., at 1-5 (Former Sec. Officials Br.) (cataloguing at least 14 examples of similar programs reaching between 25,000 and 1.8 million aliens each).

The Family Fairness program initiated by the Reagan administration (and expanded during the presidency of George H.W. Bush) is a notable example. That program rendered more than one million aliens eligible for voluntary departure, a number estimated to account for 40% of undocumented aliens in the United States at the

time.[2] *See* Former Sec. Officials Br. 8 (citing *Immigration Act of 1989: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 101st Cong., 2d Sess. Pt. 2, at 49 (1990) (statement of Gene McNary, Comm'r, INS); Jeffrey S. Passel et al., Pew Research Center, *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled* 4 (Sept. 3, 2014)).

Far from condemning the Executive's decision to implement a policy on this scale, Congress ratified it, enacting a law that provided for an even broader group to obtain lawful status after a one year delay. Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, Tit. III, § 301(g), 104 Stat. 5030. The law specifically clarified that the one-year delay "shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." *Id.*

Respondents contend that DAPA must be too large because it could affect more than 4 million aliens. But given that there are an estimated 11 million removable aliens presently in the United States and

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[2] Respondents argue that the Family Fairness program actually granted benefits to only about 47,000 people, but that is because "[s]urprisingly few newly legalized immigrants [took] advantage" of the program. David Hancock, *Few Immigrants Use Family Aid Program*, Miami Herald, Oct. 1, 1990, at 1B. The same result could occur with respect to DAPA. That is why the relevant comparison is the number of aliens the program made *eligible* for voluntary departure, and that number was estimated to exceed one million.

DAPA reaches approximately 40% of those removable aliens, it reflects the same percentage affected by the Family Fairness program. Further, resource constraints dictate that the Executive is capable only of removing approximately 400,000 aliens per year. That means that at the present time the Executive has no choice but to allow at least 10.6 million removable aliens to remain in the country.

DAPA establishes rational priorities as to which members of the large pool of removable aliens should be permitted to remain temporarily, and provides a means by which these individuals can support themselves. And because DAPA is a general policy that has been announced to the public, it ensures political accountability with respect to the Executive's immigration determinations. It also ensures that Congress is aware of the Executive's priorities and policies so that if Congress wishes, the Executive's ability to act may be withdrawn or limited by statute.

Invalidating DAPA because of its scale will not ensure that more aliens without lawful status will be removed from the country. Instead, it will mean that individual immigration enforcement officers will lack guidance from the Executive with respect to how limited enforcement resources should be spent. The result will be a less cohesive immigration policy and less political accountability.

Policies such as DAPA also encourage large numbers of unauthorized aliens to make themselves known to the government, making it easier to develop and administer an effective and enforceable system. Again, invalidating DAPA will not ensure that the aliens DAPA might have reached will

instead be removed, but it will make it likely that they will remain in hiding.

Finally, invalidating DAPA based on its scale will interfere with the Executive's ability to set immigration policies and priorities in the future. In the absence of Congressional direction, if the Executive is faced with regular challenges to immigration policies or programs based on scale, it likely will be more inclined to act in an ad hoc or piecemeal fashion. The cost with respect to efficiency, political accountability, and uniformity would be significant.

B. The Secretary's Authority To Grant Work Authorization Is A Key Feature Of The Federal Immigration System.

Respondents also assert that the Executive lacks the authority to provide work authorization to eligible deferred action recipients because the INA specifies the only categories of aliens that may be given employment authorization. If this Court were to reach such a conclusion, it would represent a major and unprecedented shift in immigration policy and practice and would ignore the clear intent of Congress as expressed in statutory and non-statutory actions.[3]

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[3] Amici question whether the validity of the work authorization component of DAPA is properly before this Court. The Fifth Circuit held that respondents have standing to challenge DAPA because respondents are harmed by DAPA's expansion of the class of aliens who would be considered "lawfully present." Even if the lower court's standing ruling is correct, it does not mean that respondents have standing to challenge the portions of

As part of its general immigration authority, the Executive has exercised the power to grant work authorizations to aliens since at least 1952. *See, e.g.* 17 Fed. Reg. 11,489 (Dec. 19, 1952) (8 C.F.R. § 214.2(c) (1952)) (barring certain aliens from working "unless such employment * * * has first been authorized by the district director or the officer in charge having administrative jurisdiction over the alien's place of temporary residence"). By the 1970s, it was standard practice for the Executive to authorize employment for aliens without lawful status that the Executive chose not to deport. Sam Bernsen, Gen. Counsel, INS, *Leave to Labor* (May 30, 1975), 52 No. 35 Interpreter Releases 291, 294 (Sept. 2, 1975).

The Reagan administration codified this longstanding practice in its 1981 regulation. In addition to recognizing the Executive's authority to grant work authorization based on deferred action, the regulation also recognized several other non-statutory categories of aliens who were eligible for employment. For example, while a statute grants

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DAPA that describe deferred action recipients as eligible for *work authorization*. A holding that DAPA beneficiaries are barred from receiving work authorization would not redress respondents' harm because it would leave the remainder of the DAPA policy in place.

Further, it is not DAPA itself, but a pre-existing regulation that makes deferred action recipients eligible for work authorization. *See supra* Part I.A. Respondents have not demonstrated standing to challenge that regulation, and in any event the time limit for such a regulatory challenge has expired. *See* 28 U.S.C. § 2401(a).

asylum recipients work authorization, the 1981 regulation extended that authorization to asylum applicants. 8 C.F.R. § 109.1(b)(2) (1982).

Further, over the last several decades, the programs the Executive has used to grant non-statutory relief to a particular class of aliens have provided specifically for work authorization. *See, e.g.*, Former Sec. Officials Br. app., at 1-5 (listing several examples). Again, the Family Fairness program is a notable example. *See* McNary Memo app. I, at 165.

If the Executive cannot grant employment authorization to those it has decided not to remove, then it must leave those aliens with no legal means to support themselves. The inevitable result is either destitution and thereby becoming a public charge, or illegal and unregulated employment.

Thus, if respondents prevail in their challenge to DAPA and the authority of the Executive to grant work authorization to recipients of deferred action, it would end a long standing Executive practice—carried out under Congressional grants of power to the Executive—and would destroy a tool critical to the Executive's ability to efficiently, effectively, and faithfully execute and enforce the Nation's immigration laws.

C. The Remaining Effects Of DAPA Are Well Within The Secretary's Power To Confer.

There are two other minor consequences of the DAPA policy; neither affects DAPA's validity. *First*, a recipient of deferred action is considered "lawfully present." But that designation does not mean the alien is no longer in violation of immigration law. It means only that the Executive has chosen to delay

his or her removal. Such an alien can still be removed at any time, and the alien does not become eligible for permanent residence or any other immigration status.

Indeed, the primary practical effect of this designation is that the deferred action time is not counted as time in which the alien is "unlawfully present" within the United States. 8 U.S.C. § 1182(a)(9)(B). That calculation is relevant only with respect to a statutory provision that makes an alien inadmissible for three or ten years if he or she departs the United States after having been "unlawfully present" for six months or a year, respectively. *Id.* Since recipients of deferred action under the DAPA policy must have been in the country before 2010, this consequence of DAPA is of little practical significance, and is well within the Secretary's discretion to control.

Second, granting deferred action makes an alien eligible for certain Social Security, Medicare, and railroad retirement benefits. 8 U.S.C. § 1611(b)(2)-(4). However, the Executive has specific statutory authority to determine eligibility in this respect. While most public benefits are only available to "qualified alien[s]," a term that does not include recipients of deferred action, *see id.* § 1611(a); *see also id.* § 1641(b), some benefits are open to those who are "lawfully present in the United States *as determined by the Attorney General*." *Id.* at § 1611(b)(2)-(4) (emphasis added). The Executive has long treated recipients of deferred action as lawfully present for the purposes of this statute, and Congress has never intervened to limit this practice.

In short, Congress has granted the Secretary ample authority to enact policies like DAPA.

III. CONGRESS REPEATEDLY HAS RECOGNIZED AND ENDORSED THE EXECUTIVE'S EXERCISE OF BROAD DISCRETION IN FASHIONING IMMIGRATION POLICY.

Invalidating DAPA would also be inconsistent with Congress's repeated endorsement and encouragement of the Executive's use of its statutory powers to grant deferred action and work authorization.

A. Congressional Indications Of Intent Support The Executive's Use Of Deferred Action.

Deferred action originated as an exercise of the Executive's general grant of discretion in the immigration context; there was no "express statutory authorization" for the practice. *AADC*, 525 U.S. at 484 (quoting 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03 [2][h] (1998)). By 1996, however, Congress was not only aware of the practice, but had enacted a statutory provision designed to facilitate the Executive's use of deferred action.

As this Court noted in *AADC*, the Executive's long-standing practice of granting deferred action in some cases led to numerous legal challenges by those aliens who did not have their removal deferred. 525 U.S. at 484. This difficulty could have been solved by barring the Executive from granting deferred action. Instead, Congress confirmed the policy and provided a "measure of protection" from legal challenges. In the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, Congress insulated the Executive from these suits by including a provision "designed to give some measure of protection to 'no deferred action' decisions * * * [by] providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention." 525 U.S. at 485 (discussing the function of 8 U.S.C. § 1252(g)). Rather than condemning the Executive's exercise of its discretion with respect to deferred action, Congress protected it.

Congress also has expressed its approval for specific class-based deferred action programs initiated by the Executive. For example, in 2000, INS officials testified before Congress about the VAWA program that the Clinton administration initiated to grant deferred action for abuse victims awaiting visas. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration & Claims of the H. Comm. On the Judiciary*, 106th Cong., 2d Sess. 43 (2000) (Statement of Barbara Strack, Acting Exec. Assoc. Comm'r for Policy & Planning, INS). The officials explained that because of the program "[n]o battered alien who has filed a [successful VAWA] self petition" has been deported. *Id.* In response, in the VTVPA, Congress directed the Executive to ensure that certain self-petitioners made eligible for visa-preference by the reauthorization also should be made "eligible for deferred action and work authorization." § 12503, 114 Stat. 1522; 8 U.S.C. § 1154(a)(1)(D)(i)(II) and (IV).

On occasion, Congress also has acted on its own initiative to direct the Executive to make deferred

action available to a particular class of aliens. After the September 11 attacks, Congress instructed the Executive to extend deferred action eligibility to certain immediate family members of legal permanent residents killed in the acts of terrorism. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 361. In 2003, Congress issued a similar instruction with respect to certain family members of U.S. citizens killed in combat. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694-1695.

While Congress has endorsed, expanded, and even initiated deferred action programs, it has never (including both before and after DAPA) barred the Executive from granting deferred action to a particular group on its own initiative, nor has it suggested that express statutory authorization is necessary before the Executive may make deferred action available to a class of aliens.

To the contrary, Congress has demonstrated its understanding that the Executive already has the power to grant deferred action where it sees fit. Notably, the statutory provision at stake in *AADC*, which was designed to protect "no deferred action" decisions from judicial review, was enacted *before* Congress had provided any express authorization for deferred action. Similarly, when Congress specified that additional aliens should be eligible for the Executive's VAWA deferred-action program in 2000, it did not specify that the Executive should continue to offer deferred action to all those abuse-victims who were already eligible. Through this omission, Congress adopted the view that the Executive did not require specific statutory authorization to

continue its program; the new statutory mandate was necessary only in order to expand or alter the way in which the Executive had chosen to use the general statutory discretion it possessed already.[4]

Further confirmation is provided by Congress' statutory treatment of the Executive's decision to grant deferred action to certain victims of human trafficking and other crimes awaiting "T" and "U" visas. Again, Congress did not enact any specific authorization for this deferred action program, but it nonetheless assumed that the program would continue to exist: In 2008 legislation in which it made "T" and "U" visa applicants eligible for an "administrative stay of a final order of removal," Congress clarified that a denial of an administrative stay "shall not preclude the alien from applying for * * * deferred action." 8 U.S.C. §1227(d)(2); *see* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5060.

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[4] During the 2005 reauthorization of VAWA, Congress added a provision specifying that VAWA self-petitioners awaiting a visa are "eligible for work authorization." 8 U.S.C. § 1154(a)(1)(K); *see* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 814(b), 119 Stat. 3059. But one of the Act's sponsors specifically noted that "[t]he current practice of granting deferred action to approved VAWA self-petitioners should continue." 151 Cong. Rec. 29,334 (2005) (statement of Rep. Conyers). The new provision was simply designed to provide "DHS statutory authority to grant work authorization * * * without having to rely upon deferred action." *Id.*

The presence of such legislative statements acknowledging the Executive's discretion to grant deferred action, coupled with the absence of any statutory limitations on the grant of deferred action, provide a clear indication that Congress has endorsed the Executive's exercise of discretion in this area.

B. Congress Also Has Recognized And Endorsed The Executive's Authority To Grant Work Authorization.

Congressional references to the Executive's work authorization authority similarly express Congressional intent with respect to the Executive's discretion. For example, in 1974, Congress acknowledged the Executive's right to grant work authorization when it passed the Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-519, 88 Stat. 1652. That enactment barred farm labor contractors from knowingly employing any "alien not lawfully admitted for permanent residence or who has not been authorized *by the Attorney General to accept employment.*" 7 U.S.C. § 2045(f) (Supp. IV 1974) (emphasis added).

Further, five years *after* the Reagan administration promulgated its regulation describing the circumstances, including deferred action, in which the Attorney General would grant work authorization, Congress passed the Immigration Reform and Control Act. That act created a system of civil and criminal penalties designed to prevent "unauthorized alien[s]" from obtaining work. IRCA § 101(a), 100 Stat. 3361. Congress defined an "unauthorized alien" as one who is "not * * * either (A) an alien lawfully admitted for permanent

residence, or (B) authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). By defining an "unauthorized alien" in this way, Congress expressly recognized the Executive's existing authority to grant work authorization to individuals beyond those specified in the statute.

Indeed, the year after the IRCA was passed, the Reagan administration denied a petition challenging the Attorney General's power to authorize employment to aliens who were not specifically granted work authorization by a statutory provision. The published denial pointed to Section 1324a(h)(3) and explained that the only way to understand its text is to conclude "that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such a fashion as to exclude" *both* "aliens who have been authorized employment by the Attorney General through the regulatory process" *and* "those who are authorized employment by statute." 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987).

Ten years later, Congress confirmed this understanding when it placed three minor limitations on the Executive's authority to grant work authorizations. In a 1996 law, Congress stipulated that the Attorney General "may not provide [an] alien [who has been arrested, detained, and released on bond pending a removal determination] with work authorization * * * unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such

authorization." IIRIRA § 303(a), 110 Stat. 3009-585; 8 U.S.C. § 1226(a)(3). In the same statute, Congress provided that "[n]o alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that * * * the alien cannot be removed" or "the removal of the alien is otherwise impracticable or contrary to the public interest." *Id.* § 305(a)(3), 110 Stat. 3009-600, 8 U.S.C. § 1231(a)(7). Finally, Congress specified that an asylum applicant "who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of the" asylum application. *Id.* § 604, 110 Stat. 3009-693; 8 U.S.C. § 1158(d)(2).

These minor limitations serve to demonstrate the breadth of the Executive's discretion with respect to employment authorization. The very fact that Congress recognized a need to limit the granting of work authorization to these particular groups indicates Congress' understanding that—absent such a limitation—the Executive is free to grant employment authorization as it sees fit. Certainly these limited prohibitions put to rest any general argument that the Executive is only permitted to issue employment authorizations when a statute expressly grants the alien work eligibility. If that were the case, then limited prohibitory provisions like these would be surplusage.

Moreover, even in establishing these limits on the Executive's ability to grant employment authorization in specified situations, Congress was careful to preserve the Executive's discretion. When an alien has been arrested and detained, the Secretary may nevertheless permit employment if

work authorization would have been permissible absent removal proceedings. *See* 8 U.S.C. § 1226(a)(3). And even when an alien is under an order of removal, the Secretary may permit him or her to work if he or she deems removal impracticable or contrary to the public interest. *Id.* § 1231(a)(7).

Given that the Secretary may issue a work authorization even after an alien has been ordered removed, there can be no doubt that Congress intended the Executive to have the right to grant work authorization to a recipient of deferred action who has not been conclusively judged removable.

Finally, in the three decades since Congress enacted the IRCA, the Executive has repeatedly granted work authorization to recipients of deferred action, including through deferred action policies like the VAWA program. Congress has expressed approval for such programs, and it has never limited the Executive's ability to grant work authorization in these situations. That silence is revealing particularly since Congress has amended Section 1324a of the IRCA at least *six* times during the same period. The inescapable inference is that Congress has endorsed the Executive's understanding of its power to grant both deferred action and work authorization.

IV. DAPA DOES NOT VIOLATE THE CONSTITUTION'S TAKE CARE CLAUSE.

Respondents attempt to bolster their statutory claims with an unconvincing constitutional argument. They assert that DAPA violates the Take Care Clause, and separation of powers in general. But this is nothing more than a restatement of respondents' statutory argument. If DAPA

represents a valid exercise of the statutory authority delegated to the Executive branch, as Amici contend, then the President has fulfilled his duty to ensure that the law is "faithfully executed." U.S. Const. art II, § 3.

It certainly cannot be the case that the President has violated this constitutional duty by failing to remove all of the aliens who are statutorily eligible for removal. Such a contention is directly contrary to the Court's recent statement that the Executive enjoys removal discretion, including the power to decide "whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. Perhaps more importantly, such a contention is seriously at odds with reality and the construct of our constitutional order in which Congress has the "power of the purse."

Congress has provided the Executive with the resources to remove an estimated 4% of removable aliens. The President cannot violate the Take Care Clause by announcing a policy that could lead to the deferred removal of 40% of removable aliens, when budgetary constraints alone dictate that he *must* defer the removal of approximately 96% of such aliens. The Constitution does not mandate that Congress appropriate funds adequate to carry out the provisions of every law it has enacted. Nor does the Constitution mandate that the President do the impossible

If Congress had designated ample funds for the removal of all aliens that are illegally present in the country, and *if* Congress had directed the Executive to ensure that all such aliens were removed, *then* the Executive might violate the Constitution by declining

to remove such aliens. But we are very far from that hypothetical situation. There is no evidence of a constitutional violation.

CONCLUSION

For these reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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